QUESTIONS PRESENTED

1. Whether a prosecutor's proffered explanation that prospective Latino jurors were struck from the venire because he was afraid that they might not abide by official translations of Spanish language testimony constituted an acceptable "race neutral" explanation under *Batson v. Kentucky*, 476 U.S. 79 (1986).

2. What is the standard of review an appellate court should apply when reviewing a trial court's acceptance of the prosecutor's reason as race neutral.

LIST OF PARTIES

The petitioner is Dionisio Hernandez. The respondent is the State of New York, represented in this criminal prosecution by Kings County District Attorney Charles J. Hynes.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DIONISIO HERNANDEZ,

Petitioner,

—against—

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

OPINIONS BELOW

The opinion of the New York Court of Appeals (Joint App. at 26-45) is reported at 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990). The opinion of the New York Supreme Court, Appellate Division, Second Department (Joint App. at 24-25) is reported at 140 A.D.2d 543, 528 N.Y.S.2d 625 (2d Dep't 1988). The opinion of the trial court (Joint App. at 8-12) is not reported.

JURISDICTION

The judgment of the New York Court of Appeals was rendered on February 22, 1990. The petition for certiorari was filed on May 23, 1990 and was granted on October 6, 1990. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 8, 1985, petitioner Dionisio Hernandez [hereafter referred to as defendant] chased Charlene Calloway down a street in Brooklyn, New York and shot her twice with a .38 caliber revolver, severing two vertebrae in her neck. Defendant then fired his revolver at Ms. Calloway's mother, Ada Saline, but missed her, hitting instead two men inside a nearby building. Immediately after the shooting, defendant's revolver was recovered from the ground, and a fully-loaded .25 caliber pistol was found in a holster on his leg. Ms. Calloway's injuries were life-threatening, but she and the other victims recovered. Kings County Indictment Number 7649/1985 charged defendant with Attempted Murder in the Second Degree (two counts) and other lesser crimes.

In November 1986, the case was tried before a jury. During jury selection, defendant moved for a mistrial following the prosecutor's use of peremptory challenges to strike four prospective jurors, whom defendant identified as Latino. Without waiting for a ruling on whether defendant had established a *prima facie* case of discrimination, the prosecutor explained that he had challenged two of the jurors because each had a brother who had been convicted of a crime. He challenged the two other potential jurors because a critical prosecution witness in this case was expected to testify in Spanish, and the jurors had said during the *voir dire* that their fluency in Spanish might make it difficult for them to accept the official English interpretation of testimony to be given in Spanish. The trial court found that the prosecutor's explanations were not based on race, were supported by the *voir dire*, and were not pretextual. It therefore denied defendant's mistrial motion.

At the conclusion of the trial, defendant was convicted of two counts of attempted murder and two counts of criminal possession of a weapon. On appeal, the New York Supreme Court, Appellate Division, Second Department, affirmed the judgment of conviction, finding that the prosecutor's reasons for the peremptory challenges were race-neutral and that their validity was supported by the record. On further appeal, the New York Court of Appeals affirmed and ruled that the record-based reason advanced by the prosecutor to support the peremptory challenges of the Spanish-speaking jurors was race-neutral and did not appear as a matter of law to be pretextual. Defendant challenges that determination.

The Jury Selection and Mistrial Motion

The *voir dire* in this case took place in November 1986, approximately six months after this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). Neither the questioning of the potential jurors nor the exercise of peremptory challenges was recorded. The record contains colloquy on requests to challenge specific potential jurors for cause and argument on motions made during jury selection. In addition, the trial court kept a list of the names of the potential jurors who were questioned during *voir dire*, on which it recorded whether each potential juror was dismissed by the court, on consent, for cause, or by peremptory challenge, or was seated on the jury. This list does not indicate the race or national origin of the potential jurors.

At the end of the fourth round of *voir dire*, after 63 potential jurors had been questioned and nine jurors had been empaneled, defendant challenged the prosecutor's use of peremptory challenges to strike four potential jurors whom defendant identified as Latino.[1] Defense counsel claimed that

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1 Defendant does not question the challenge of the two jurors whose immediate family members had been convicted of crimes.

the prosecutor had removed every Latino from the venire and asserted that the prosecutor had no real reason to challenge any of them. Counsel did not argue that the prosecutor's peremptory challenges violated the Constitution. Nor did he cite to *Batson*; he claimed only that the prosecutor had violated an internal policy of the Kings County District Attorney's Office. Counsel stated that this policy had been expressed in an article published in the New York Law Journal, reporting that Assistant District Attorneys in Kings County were not permitted to challenge African-American, Latino, or other minority jurors on the basis of race.[2]

Without waiting for the trial court to rule on whether defendant had made out a *prima facie* case, the prosecutor offered his reason for challenging two jurors in the fourth round, who were later identified as Lydia Mikus[3] and Ismael Gonzalez. The prosecutor explained that he did not know if both of the jurors were Latino, but had challenged them because they had each given him reason to believe that they would have difficulty accepting the official court interpreter's translation of the testimony of Spanish-speaking witnesses, as opposed to relying on their own understanding of the Spanish-language testimony.

The prosecutor stated that during a lengthy series of questions posed by the court and the prosecutor, both jurors had

2 In fact, the District Attorney's policy precluding racial discrimination in jury selection was implemented before this Court decided *Batson*. The Kings County District Attorney's Office argued in briefs to the New York Court of Appeals, the Second Circuit Court of Appeals, and in an *amicus* brief in *Batson* that the exercise of peremptory challenges on the basis of race violated the New York State and Federal Constitutions. *See* Brief for Respondent, *People v. McCray*, 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441, *cert. denied*, 461 U.S. 961 (1982); Brief for Respondent, *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded for reconsideration in light of Batson*, 447 U.S. 1001 (1986); Brief for District Attorney of Kings County as *Amicus Curiae*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

3 The court reporter phonetically transcribed Mikus' name as "Mico" and "Micous" during the *voir dire*. However, "Mikus" is used in this brief because it is the spelling that appears to be written on the court's jury challenge sheet (Joint App. at 12).

equivocated about their ability to accept as final and authoritative the official English translation of testimony given in Spanish. He noted that, "[w]e talked to them for a long time; the Court talked to them, I talked to them." When asked if they could accept the interpreter's version of the testimony, both jurors looked away from the prosecutor and "said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter." The jurors' equivocal answers caused the prosecutor to believe that "they would be hard pressed to accept what the interpreter said as the final thing on what the record would be." To clarify their responses, the prosecutor asked the court to question the jurors further. Although both jurors ultimately answered that they could accept the translation as final, "they both indicated that they would have trouble," and the prosecutor "felt from the hesitancy of their answers and their lack of eye contact, that they would not be able to do it."

The prosecutor explained that testimony given in Spanish was very important in this case because several critical witnesses, including the chief prosecution witness, Ada Saline, were expected to testify through a Spanish-language interpreter. The prosecutor was concerned that, given the importance of the anticipated Spanish-language testimony, jurors who interpreted for themselves rather than relying on the official interpreter's translation "would have an undue influence on the jury" during deliberations.

The prosecutor also argued that any race-related motivation an attorney might have for excluding Latinos from the jury was negated in this case because all of the parties involved, including the four victims and the civilian prosecution witnesses, were Latino. Defense counsel responded that the prosecutor did not want Latinos on the jury because of the fear that they would sympathize with defendant.

The court credited the prosecutor's reasoning, noting as an aside that Latino jurors "might feel sorry for a guy who's had a bullet hole through him, he's Hispanic, so they may relate to him more than they'll relate to the shooter."

Defense counsel then argued that the prosecutor's peremptory challenges to the two jurors were improper because both had said, in response to the trial court's inquiry, that they could render a fair and impartial verdict. Counsel noted that the prosecutor had refused to consent to defendant's cause challenges to several jurors who were related to police officers but who had indicated that they could fairly evaluate police testimony. The prosecutor explained that he had treated all jurors the same; because the Spanish-speaking jurors had stated that they could be fair, he did not believe that it was appropriate to challenge them for cause either. He had, however, consented to cause challenges to any juror who had stated that he or she could not be fair, including at least one person related to a police officer.

Finally, defense counsel claimed that the prosecutor had challenged the two jurors in order to force defendant to accept a juror whose son was a police officer, noting that the next two prospective jurors had police officer sons and defendant had only one peremptory challenge remaining. Defense counsel argued that "[w]e can't possibly get a fair trial if that condition is going to continue here . . . because I'm going to get caught here with two women whose sons are cops, they're not going to do me any good anywhere."

Defendant offered no evidence to challenge the factual accuracy of the prosecutor's characterization of the jurors' answers and demeanor when questioned about their ability to decide the case based on the official English translation of testimony given in Spanish. Nor did he argue that the prosecutor had misunderstood the jurors' failure to make eye contact. Defendant did not advance the theory, which he raised for the first time on appeal, that the jurors' hesitancy or equivocal answers were simply the natural consequence of their language fluency and therefore that the prosecutor's challenges, even if genuine, were not race-neutral as a matter of law. Nor did he suggest that instructing the jurors to communicate any disagreement with the official interpretation to the court could effectively address the prosecutor's concern

that all jurors rely on the same version of the testimony when deciding the case.

The court found that the prosecutor's explanation for his challenges of the two Spanish-speaking jurors was both nonpretextual and supported by the record of the *voir dire*. Based on the *voir dire* and the argument on the motion, the court denied defendant's mistrial motion and expressly rejected the claim that the prosecutor had sought to exclude Latino jurors because of their ethnicity.

The Trial and Sentence

Following jury selection, the case proceeded to trial. While the jury did not hear from Mrs. Saline, whom the prosecution had expected throughout jury selection would be one of its witnesses,[4] another witness, Freddy Nieves did testify through a Spanish-language interpreter. On November 17, 1986, the jury found defendant guilty of two counts of Attempted Murder in the Second Degree (N.Y. Penal Law §§ 110.00/125.25[1]), Criminal Possession of a Weapon in the Second Degree (N.Y. Penal Law § 265.03), and Criminal Possession of a Weapon in the Third Degree (N.Y. Penal Law § 265.02[4]). On January 30, 1987, the court sentenced defendant to concurrent terms of imprisonment of four to twelve years for each attempted murder count, one and one-third to four years for second-degree weapon possession, and one to three years for third-degree weapon possession.

The Appeals

The New York Supreme Court, Appellate Division, Second Department, affirmed the judgment of conviction in an opinion dated May 16, 1988. The Appellate Division, which has

4 Mrs. Saline cooperated until the jury selection process was completed, and was expected to testify for the prosecution, but fled to Puerto Rico with Ms. Calloway on the day testimony was to begin. Even though his wife was allegedly visiting relatives, defendant claimed that he did not know where in Puerto Rico she and her mother were staying.

factfinding power, N.Y. Crim. Proc. Law § 470.15(1), unanimously rejected defendant's claim that the prosecutor had exercised his peremptory challenges on the basis of race. *People v. Hernandez*, 140 A.D.2d 543, 528 N.Y.S.2d 625 (2d Dep't 1988). Although it determined that defendant had made out a *prima facie* case of discrimination, the Appellate Division found that the prosecutor's reason for challenging the two jurors was sufficient to satisfy the prosecutor's burden of coming forward with non-discriminatory reasons for his challenges in order to rebut the *prima facie* showing. 140 A.D.2d at 543, 528 N.Y.S.2d at 626.[5] The court found that the two jurors "were challenged because they both spoke Spanish and indicated during the voir dire that they might have difficulty accepting as final and authoritative the court interpreter's translation of the testimony." 140 A.D.2d at 543, 528 N.Y.S.2d at 626.

On appeal to the New York Court of Appeals, defendant argued for the first time that the prosecutor's genuine, record-supported belief in the inability of the two Spanish-speaking jurors to accept the official English translation of the testimony was, as a matter of law, an impermissible basis for a peremptory challenge. In support of that position, defendant claimed that the jurors' hesitancy about their ability to accept the official translation was grounded in their knowledge of Spanish, a factor so inextricably intertwined with Latino identity that the prosecutor's actions were tantamount to challenges based on ethnicity.

In an opinion dated February 22, 1990, the Court of Appeals affirmed the order of the Appellate Division and rejected defendant's claim that the prosecutor's reason was a *per se* violation of *Batson*, ruling that:

> These jurors, however, were challenged because they indicated their knowledge of the Spanish language might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony. So it cannot be, as defendant has posed it and as the dissenting opinion would conclude, that the isolated language-ethnic identity factor alone determines this case.

People v. Hernandez, 75 N.Y.2d 350, 356, 552 N.E.2d 621, 623, 553 N.Y.S.2d 85, 87 (1990).

The court carefully analyzed defendant's claims pursuant to the *Batson* framework which, the court noted, "abandoned the prosecutorially weighted evidentiary tilt of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759, and imposed a new and important calculus." 75 N.Y.2d at 355, 552 N.E.2d at 623, 553 N.Y.S.2d at 87. The court ruled that the inability or unwillingness of the two Spanish-speaking jurors to accept the evidence properly submitted to them by the court was a legitimate neutral ground for exercising a peremptory challenge, holding that "[h]esitancy or uncertainty about being able to decide the case on the same evidence which binds every member of a jury is a proper, neutral and nondiscriminatory basis for the prosecutorial exercise of peremptory challenges." 75 N.Y.2d at 356, 357-58, 552 N.E.2d at 623-24, 553 N.Y.S.2d at 87-88. The court held that because the prosecutor's reason for the challenges was race-neutral on its face, it was the trial court's duty to determine whether it was pretextual or real and whether it was justified by the answers and conduct of the challenged jurors during *voir dire* in this case. 75 N.Y.2d at 356-57, 552 N.E.2d at 623-24, 553 N.Y.S.2d at 87-88.

Relying on this Court's holding in *Batson*, 476 U.S. at 98 n.21, the New York Court of Appeals ruled that the resolution of these factual issues by both lower courts was entitled to "great deference" on appeal. The court examined the record with care and stated that there was no basis in law or policy to conclude that the lower courts had erred in these determinations. 75 N.Y.2d at 356-57, 552 N.E.2d at 623-24, 553 N.Y.S.2d at 87-88. The court held that

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5 The Appellate Division also found that the Latino origin of one of the two Spanish-speaking jurors was "questionable." 140 A.D.2d at 543, 528 N.Y.S.2d at 625.

> the prosecution documented its belief on the jurors' statements and on doubt-raising body language descriptions (e.g., averted eyes and gazes on being questioned on the critical points) developed during an extensive voir dire and placed [that documentation] on the record before the Trial Justice, who was also present at the entire voir dire. The record-based beliefs, advanced to satisfy its *Batson*-based burden, do not appear to us as a matter of law and did not appear to the lower courts as a matter of fact to be some facial facade. If the court was not satisfied with the adequacy of this explanation after watching and listening to the proceedings, of course it could have conducted a further voir dire.

75 N.Y.2d at 356-57, 552 N.E.2d at 624, 553 N.Y.S.2d at 88. But it warned that "pretextual maneuvering or less verifiable manifestations of a juror's attitudes about adhering to governing instructions will not satisfy the prosecution's burden." 75 N.Y.2d at 358, 552 N.E.2d at 624, 553 N.Y.S.2d at 88.

The two dissenting judges argued, primarily as a matter of state law, 75 N.Y.2d at 360-61, 552 N.E.2d at 626-27, 553 N.Y.S.2d at 90-91, that a facially neutral explanation by a prosecutor that may nonetheless have a disparate impact on members of a defendant's racial group is "inherently suspect" and must be subjected to some kind of enhanced scrutiny. 75 N.Y.2d at 363, 552 N.E.2d at 628, 553 N.Y.S.2d at 92. The dissent did not explain how that scrutiny differed from the procedures required by *Batson*.

Apparently placing the ultimate burden of proof on the prosecutor, the dissent argued that the prosecutor had made an insufficient evidentiary record to meet this "enhanced" standard of scrutiny because the two jurors had ultimately assured the trial court that they would accept the official translation, and the prosecutor had failed to establish that any other members of the panel had also been asked if they spoke Spanish. 75 N.Y.2d at 362-63, 552 N.E.2d at 627-28, 553 N.Y.S.2d at 91-92. The dissent did not contend that the prosecutor's reason for challenging these jurors was a *per se*

Batson violation, but rather concluded that, on this record, the prosecutor's "subjective impression (based on lack of eye contact) of the sincerity of the jurors' assurances that they would accept the interpreter's version of what the witnesses said" was nothing more than an intuitive judgment deriving from the jurors' heritage. 75 N.Y.2d at 364, 552 N.E.2d at 628, 553 N.Y.S.2d at 92.

This Court granted defendant's petition for a writ of certiorari by an order entered on October 6, 1990. *Hernandez v. New York*, 111 S. Ct. 243 (1990).

SUMMARY OF ARGUMENT

This case, contrary to defendant's contention, does not involve discrimination on the basis of language or national origin. The record demonstrates that the peremptory challenges at issue here were motivated by the prosecutor's concern, developed by the questions and answers during *voir dire*, that two individual prospective jurors might not be able to decide the case based on the evidence available to the remainder of the jury. The prosecutor did not challenge the jurors because they were Latino or because he assumed that all Spanish-speaking jurors would be unable to decide fairly a case involving testimony in Spanish—an untenable assumption both contrary to the notion that jurors are to be treated as individuals, and forbidden by the policy of the Kings County District Attorney. Rather, he challenged them because these particular jurors indicated they might have difficulty deciding this case solely upon the admissible evidence.

The prosecutor's reason for challenging the jurors was, irrefutably, related to the case on trial and articulated with sufficient specificity to be reviewed by the courts. The genuineness of that reason, as the state appellate courts properly found, is demonstrated by the record and is largely unquestioned by defendant in this case. Thus, the prosecutor's reason for exercising the peremptory challenges was legitimate and race-neutral under settled principles of equal protection

law. *See Batson*, 476 U.S. at 97-98; *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Defendant's argument that the prosecutor's reason nonetheless represented a *per se* violation of *Batson* is fundamentally flawed. Defendant's statistical analysis fails to support his assumption that all Latino jurors will express the same equivocation as did the jurors in this case. Moreover, his analysis ignores the intent-driven inquiry mandated by the Equal Protection Clause. *Batson* does not prohibit a prosecutor's reliance on an otherwise race-neutral ground for the exercise of a peremptory challenge simply because of an asserted disparate impact, or simply because the prospective juror has made problematic comments for reasons that are related to the juror's race, ethnicity, or national origin. The Equal Protection Clause only prohibits purposeful discrimination by the prosecutor. *Batson*, 476 U.S. at 93.

The appellate courts in New York also fulfilled their responsibilities under the Equal Protection Clause. In express reliance on the *Batson* framework, the courts first determined that the prosecutor's reason was neutral on its face, and then carefully reviewed the entire record of the *voir dire*, giving appropriate deference to the trial court's factual determinations, and concluded that defendant had not met his burden of establishing purposeful discrimination in this case. Contrary to defendant's claim that appellate courts must review the factual determinations *de novo*, the traditional equal protection analysis adopted by this Court accords such determinations deference on appeal, to be reversed only if clearly erroneous. *Batson*, 476 U.S. at 98 n.21; *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

Defendant has offered no justification for the application of a new standard of appellate review in *Batson* cases. Because the New York courts properly ruled that the prosecutor's reason for challenging these jurors was race-neutral and sufficient to rebut defendant's *prima facie* showing of discriminatory intent, the decision below should be affirmed.

POINT I

A PROSPECTIVE JUROR'S HESITANCY TO ABIDE BY THE OFFICIAL TRANSLATION OF SPANISH LANGUAGE TESTIMONY, DEMONSTRATED ON THE RECORD, IS A LEGITIMATE, RACIALLY NEUTRAL REASON FOR THE EXERCISE OF A PEREMPTORY CHALLENGE.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court reaffirmed that the prosecution's exercise of peremptory challenges is limited by the core guarantee of the Equal Protection Clause that the state not discriminate against any citizen on the basis of race:

> Although a prosecutor ordinarily is entitled to exercise peremptory challenges 'for any reason at all, so long as that reason is related to his view concerning the outcome' of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

476 U.S. at 89 (citations omitted). To implement that holding, this Court requires the prosecutor to explain the basis for peremptory challenges once the defense meets its burden of establishing a *prima facie* case that the prosecutor's challenges were motivated by racial discrimination. The prosecutor's reason must be race-neutral, related to the case to be tried, and legitimate. *Batson*, 476 U.S. at 97-98, 98 n.20 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 [1981]). This Court emphasized, however, both that the prosecutor's reason need not rise to the level of a challenge for cause, *Batson*, 476 U.S. at 97, and that, as with all other persons claiming an equal protection violation, the defendant must establish purposeful discrimination in order to prevail. *Batson*, 476 U.S. at 93.

A prosecutor cannot rebut a *prima facie* case of discrimination in jury selection simply by relying on racial stereotypes or assumptions, or by denying any discriminatory motive. *Batson*, 476 U.S. at 97-98. Instead, the prosecutor must give "trial-related reasons for his strikes—some satisfactory ground other than the belief that black jurors should not be allowed to judge a black defendant." *Batson*, 476 U.S. at 101-02 (White, J., concurring). The "central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race," *Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also Holland v. Illinois*, 110 S. Ct. 803, 825 (1990) (Stevens, J., dissenting).[6] Thus, a prosecutor cannot use peremptory challenges "to exclude Afro-American prospective jurors on the ground that they, as a class, lack the intelligence or impartiality to fill the jurors' role." *Holland*, 110 S. Ct. at 819 (Marshall, J., dissenting).

The evil that the Constitution prohibits is the exclusion from jury service of individuals "not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background." *Lockhart v. McCree*, 476 U.S. 162, 175 (1986). *Batson*, however, was not intended to bar the exclusion of persons who, because of a specific trait or ability, give reason

6 While *Holland* was brought as a Sixth Amendment fair cross-section case, much of its discussion of racial neutrality relies on the *Batson* analysis. In defining the State's obligation of neutrality in jury selection, Justice Stevens noted:

> The Sixth Amendment does not forbid the State from removing jurors on the basis of partiality or other *relevant* individual characteristics. Even if the prosecutor's peremptory challenges based on such considerations, when aggregated, could be considered to result in the exclusion of a 'cognizable group,' that group by definition would be one that is ineligible for jury service for legitimate state reasons. . . . [However,] the State may not remove jurors for unconstitutional reasons or reasons relevant only to eliminating a group from the community eligible for jury service. That is, the State may not remove jurors solely on account of race.

110 S. Ct. at 828 n.16 (Stevens, J., dissenting) (emphasis in original).

to believe that they may be unable to serve fairly as jurors in a particular case. *See McCray v. Abrams*, 750 F.2d 1113, 1132 (2d Cir. 1984), *vacated and remanded for reconsideration in light of Batson*, 478 U.S. 1001 (1986).

In this case, the prosecutor set forth a race-neutral reason for his peremptory challenges against the two Spanish-speaking jurors, and the New York courts found his reason to be genuine. The trial court and both state appellate courts concluded—and the record reflects—that these jurors "were challenged because they indicated their knowledge of the Spanish language might interfere with their sworn responsibility as jurors to accept the official translation of the Spanish-proffered testimony." *People v. Hernandez*, 75 N.Y.2d 350, 356, 552 N.E.2d 621, 623, 553 N.Y.S.2d 85, 87 (1990). The challenges "pertained to the individual qualities of [each] prospective juror and not to that juror's group association." *Commonwealth v. Soares*, 377 Mass. 461, 491, 387 N.E.2d 499, 517, *cert. denied*, 444 U.S. 881 (1979). The difficulty expressed by the jurors implicated two related concerns: their ability to follow the trial court's instructions to accept the official interpretation and to decide the case upon the evidence available to their fellow jurors; and the fear that these jurors might act as unsworn witnesses and have an improper influence on their fellow jurors.

The prosecutor did not base his challenges on any assumptions about the ability of Spanish-speaking jurors as a group to serve in this case (or even on speculation, intuition or hunch). Nor did he challenge the jurors simply because they spoke Spanish.[7] Rather, he relied on the answers actually

7 There is some support for the view that language discrimination violates the Equal Protection Clause, *compare Gutierrez v. Mun. Ct. of S.E. Judicial Dist.*, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 109 S. Ct. 1736 (1989) *with Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984) *and Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *see also Meyer v. Nebraska*, 262 U.S. 390 (1923) (violation of due process to criminalize teaching any language but English). The Kings County Dis-

given by individual Spanish-speaking jurors and on their demeanor when they gave those answers.

At trial, defendant did not challenge the fact that the jurors equivocated. He now argues that reliance on that equivocation is not race-neutral but is a "*per se* violation of *Batson*," because the source of the jurors' equivocation is derived from their ethnicity (Brief for Petitioner at 11-12). This argument is contrary to the logic of *Batson* and to the principles of equal protection law upon which *Batson* squarely rests. It, therefore, should be rejected.

A. A Juror's Hesitancy to Adhere to the Official Translation, Demonstrated On the Record, is a Race-Neutral Reason for the Exercise of a Peremptory Challenge.

One of the primary goals of jury selection is to identify those prospective jurors who may not decide the case based solely on an application of the trial court's legal instructions to the evidence presented at trial. "[T]he quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of." *Wainwright v. Witt*, 469 U.S. 412, 423 (1985). Contrary to defendant's implication (Brief for Petitioner at 24-25), bias against one side or the other is not the only problem that *voir dire* and the exercise of peremptory and cause challenges are designed to prevent. As this Court observed in *Swain v. Alabama*, 380 U.S. 202, 219 (1965), "[t]he function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." *Batson* prohibits the racially motivated exercise of challenges; it does not command prosecutors to accept jurors whose *voir dire* responses indicate that they might not be able to fulfill this obligation.[8]

trict Attorney views language discrimination in jury selection as offensive and does not permit the exercise of peremptory challenges on that basis. In any event, this case does not call upon the Court to resolve the constitutional issue raised by such discrimination.

It would disserve both the principles of *Batson* and the goal of fair trials to prohibit any challenge to individual jurors who indicate during *voir dire* that they will, or might, be unable to accept the official translation of testimony, or who are reluctant to do so. Just as jurors are not permitted to be unsworn witnesses, *see Parker v. Gladden*, 385 U.S. 363 (1966), or to rely on their own personal knowledge of the facts, the law, or the witnesses, *see Murphy v. Florida*, 421 U.S. 794 (1975); *Irvin v. Dowd*, 366 U.S. 717 (1961), it is crucial to a fair trial that the entire jury hear the same evidence and base its deliberations on that evidence, rather than on each juror's personal translation of the testimony.

Similarly, under *Batson*, it is not improper to challenge a potential juror with opinions contrary to the law, such as a juror who has reservations about the death penalty, *Brown v. Dixon*, 891 F.2d 490 (4th Cir. 1989); *People v. Sanders*, 51 Cal.3d 471, 273 Cal. Rptr. 537, 797 P.2d 561 (1990) (en banc); who may be unable fairly to consider tape-recorded evidence, *United States v. Mathews*, 803 F.2d 325, 330-31 (7th Cir. 1986), *rev'd on other grounds*, 485 U.S. 58 (1988); who has reservations about judging another human being, *United States v. Mitchell*, 886 F.2d 667 (4th Cir. 1989); or whose prior contacts with law enforcement make him "equivocal on his ability to be fair and impartial," *State v. Howard*, 789 S.W.2d 191 (Mo. App. 1990). As one commen-

8 As this Court made clear in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880), the Equal Protection Clause does not prevent a state from "prescribing the qualifications of its jurors, and in so doing to make discriminations," so long as the discriminations are not based on race or other impermissible criteria. *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 1784-85 (1989). In New York, like most states, a juror is disqualified from service if he "is of a state of mind that is likely to prevent him from rendering an impartial verdict based upon the evidence adduced at trial." *See* N.Y. Crim. Proc. Law § 270.20(1)(b). Therefore, any belief or ability of a juror that could interfere with an impartial review of the admissible evidence as defined by the court is a legitimate basis for challenging that juror.

tator recently noted, "[c]ourts properly have held that there is nothing discriminatory about challenging jurors who express doubts concerning their ability to be fair or who do not appear to understand legal rules." Raphael, *Discriminatory Jury Selection: Lower Court's Implementation of Batson v. Kentucky*, 25 Willamette L. Rev. 293, 320 (1989).

In *Mathews*, 803 F.2d at 330-31, the prosecutor challenged an African-American juror who gave "particularly hesitant responses to the judge's inquiry" regarding her ability to evaluate and accept covertly-taped evidence. The Seventh Circuit Court of Appeals concluded that the prosecutor's reliance on these responses in challenging the juror satisfied "*Batson*'s requirement that such explanations be clear and reasonably specific, contain legitimate reasons, and be related to the case." 803 F.2d at 330. Therefore, a prospective juror's record-supported hesitancy or equivocation about the ability to evaluate a particular type of evidence, such as testimony officially translated from a foreign language, is a neutral reason for challenging that juror.

The prosecutor's concern in this case that the two jurors in question might unduly influence the jury is very similar to the legitimate concern a party might have that doctors serving as jurors might unduly influence a jury making a complex medical determination; that psychiatrists or psychologists serving as jurors might unduly influence a jury determining an insanity defense; or that accountants serving as jurors might unduly influence a jury in a tax-evasion trial. The fear of undue or improper influence often prompts both defense attorneys and prosecutors to exercise peremptory challenges against jurors with special expertise regardless of whether it is clear which side stands to benefit from the juror's unique knowledge. *Batson* does not require a prosecutor to accept the risk of such influence merely because the challenged juror is of the defendant's racial or national origin group. *See United States v. Rodrequez*, 859 F.2d 1321 (8th Cir. 1988), *cert. denied*, 489 U.S. 1058 (1989) (possibility that juror who was a pharmacist might form an independent opinion on narcotics charges held a legitimate, nonracial reason to exercise a peremptory challenge under *Batson*).

Contrary to defendant's suggestion (Brief for Petitioner at 25), even jurisdictions which require the prosecutor to show the juror's "specific bias" in order to rebut a *prima facie* showing of discrimination do not require the prosecutor to establish that the challenged juror will be biased for or against one party. *See Slappy v. State*, 503 So.2d 350 (Fla. Dist. Ct. App. 1987), *aff'd*, 522 So.2d 18 (Fla.), *cert. denied*, 487 U.S. 1219 (1988); *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (1986); *Soares*, 377 Mass. at 461, 387 N.E.2d at 499; *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978). It is sufficient to show that the juror's expertise or personal feelings might affect his or her ability to deliberate fairly on a particular set of facts. *See, e.g., State v. Pemberthy*, 224 N.J. Super. 280, 540 A.2d 227, *cert. denied*, 111 N.J. 633, 546 A.2d 547 (1988) (peremptory challenge of all jurors who spoke Spanish, in a case involving the interpretation of audio-taped conversations in Spanish, found to be proper and race-neutral, particularly where one of the challenged jurors was a Caucasian who taught Spanish as a career). Thus, peremptory challenges are race-neutral and should be permitted when the *voir dire* supports a reasonable conclusion that the juror's individual characteristics might affect the juror's judgment of the case or unfairly influence the rest of the jury.

The racial neutrality of the prosecutor's reason for challenging the Spanish-speaking jurors is further demonstrated by its close relationship to a recognized cause challenge. Clearly, jurors can be removed for cause if they are unable to follow the instructions of the court defining the law and the evidence to be considered. Likewise, they can be removed on a peremptory challenge when their answers give legitimate reason to suspect their inability to follow such instructions. *See* Serr and Maney, *Racism, Peremptory Challenges and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. Crim. L. & Criminology 1, 44-45 (1988) (discussing the

validity of peremptory challenges which are closely related to recognized cause challenges).

Indeed, peremptory challenges exist precisely to enable parties to challenge jurors who display verifiable signs of an inability to consider properly a particular type of evidence, but whose responses during *voir dire* do not provide sufficient basis to warrant a challenge for cause. *See Batson*, 476 U.S. at 97; *United States v. Vacarro*, 816 F.2d 443, 457 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987); *McCray*, 750 F.2d at 1132; *Wheeler*, 22 Cal.3d at 274-75, 148 Cal. Rptr. at 901-02, 583 P.2d at 760-61. The challenges at issue here were based on a reasonable fear of the jurors' inability to judge the evidence in this case and were, therefore, entirely proper.[9]

In fact, defendant conceded in his brief to the New York Court of Appeals that a proper, race-neutral cause challenge would lie if a juror stated that he or she could not abide by the official translation. Brief for Appellant at 26 n.11, *Hernandez*, 75 N.Y.2d at 350, 552 N.E.2d at 621, 553 N.Y.S.2d at 85. The two jurors' ultimate assurances in this case that they could follow the court's instructions and accept the same evidence as the other jurors does not make the prosecution's reliance on their earlier equivocation any less race-neutral on its face. *See, e.g., Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792, 796 n.2 (1987); *see also* Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Verdicts*, 56 U. Chi. L. Rev. 153, 207 (1989). Any contrary interpretation necessarily converts the *Batson* requirement of racial neutrality into a rule pre-

9 Defendant's repeated citation to *Bruton v. United States*, 391 U.S. 123 (1968), in this context is curious. The Court's concern about the ability of jurors to follow legal instructions to consider only the appropriate evidence furnishes no support for a rule requiring the acceptance of jurors who will find it difficult to do just that. *See Cruz v. New York*, 481 U.S. 186, 194 (1987).

cluding prosecutors from challenging jurors unless they can establish a basis to support a challenge for cause.[10]

Defendants often challenge jurors who express similar hesitancy about their ability or willingness to follow the court's instructions on such matters as the presumption of innocence, the burden of proof, or the constitutional right not to testify, even when those jurors ultimately swear that they can be fair. Defense attorneys and prosecutors are entitled to prefer jurors who express no such equivocation, and *Batson* does not prohibit such a preference.[11]

10 The New York Court of Appeals properly recognized that *Batson* specifically rejected such an approach:

> That burden, moreover, does not require the prosecution . . . to come forward with reasons rising, in effect and function, to a sustainable challenge for cause, for that would extend *Batson* . . . and not apply [it]. Justice Powell's opinion for the Supreme Court in *Batson* is the primary source of guidance and development, and it is carefully modulated to require that the prosecution must show only a neutral record-based belief for exercising a now properly circumscribed right of peremptory excusal of jurors. To bear a proper and balanced burden of coming forward with a neutral explanation of a peremptory excusal of a juror is one thing; to create a new, higher burden of disproving, under "enhanced scrutiny" and the "inherently suspect" classification, a subjective, even "unconscious," state of mind is quite something else. This would be practically and legally speaking an impossible and ultimate burden of proof, not the lesser burden of coming forward with a justifiable explanation. Indeed, this rule would not just circumscribe the exercise of a peremptory challenge by the People; it would change its very nature because the People would have to prove cause for removal as to the juror and absolute purity as to themselves.

Hernandez, 75 N.Y.2d at 357, 552 N.E.2d at 624, 553 N.Y.S.2d at 88.

11 As defense counsel said in asking the court to grant a cause challenge notwithstanding such assurances, "I tried a lot of cases and I can't remember one case where any juror ever said he could not be fair and impartial." It has been held in New York to be a denial of a defendant's right to an impartial jury for the court to rely solely on a juror's assurances in denying a cause challenge:

(*Footnote continued*)

B. The Prosecutor Did Not Rely on Racial Assumptions or Stereotypes, but Based His Challenges on the Jurors' Answers and Demeanor. Therefore, His Challenges of Two Individual Prospective Jurors Were Legitimate and Nondiscriminatory.

Because "[j]ury competence is an individual rather than a group or class matter," *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946), *Batson* requires that in response to a *prima facie* case of discrimination, the prosecutor give reasons which are clearly and specifically asserted, supported by the information obtained from *voir dire*, and related to the case on trial. "If the juror is excluded because of a trait other than race, the trait must apply to the juror specifically and to the facts of the particular case." *State v. Butler*, 731 S.W.2d 265, 269 (Mo. Ct. App. 1987) (citing *Slappy*, 503 So.2d 350). These requirements were met in this case. The record demonstrates that the two Spanish-speaking jurors were not challenged because of any assumption or speculation by the prosecutor. The prosecutor's concern about these jurors' abilities to follow the court's instructions instead sprang directly from the answers they provided during *voir dire*.

The jurors were questioned about their ability to accept the translation because of the prosecutor's case-related concern. Among the witnesses he planned to call to testify at the trial was Ada Saline, an eyewitness to the entire crime and one of the victims. Mrs. Saline was to be the chief prosecution witness and was expected to testify in Spanish, with the assistance of an official court interpreter. While she ultimately did not testify, the record establishes that at the time of jury selection she was expected to do so, having cooperated with the prosecution until after jury selection was completed,

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> The mere words, themselves, however, have no talismanic power to convert a biased juror into an impartial one. . . . They must be taken in context.

People v. Blyden, 55 N.Y.2d 73, 78, 432 N.E.2d 758, 760, 447 N.Y.S.2d 866, 888 (1982).

when she fled to Puerto Rico with defendant's wife (transcript of November 3 to 7, 1986 at 40-42, 67; transcript of November 10 to 17, 1986 at 353-56). Moreover, Mrs. Saline's testimony was expected to be significant, in that she was the only available witness to the incident who could support either the officers' or the defendant's version of the shooting.

Thus, the prosecutor was legitimately concerned about the ability of each member of the jury to defer to the official court interpreter's rendition of the testimony, because it was possible that a juror with a personal and unverifiable interpretation of that testimony might have an undue influence in the jury room. The prosecutor addressed this concern by questioning (and asking the court to question) the Spanish-speaking prospective jurors to determine their willingness and ability to put aside any special language expertise and to decide this case on the evidence before the rest of the jury.

In response to these questions, the two jurors offered "a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses" (Joint App. at 3). Although defendant now seeks to discredit the prosecutor's reliance on the jurors' equivocation and demeanor, he did not challenge the factual basis for that reliance before the trial court, which had the benefit of hearing the actual questions and answers and observing the demeanor of the jurors. Moreover, in his brief to this Court, defendant repeatedly concedes the existence of the jurors' equivocation (*see* Brief for Petitioner at 12-13, 15-16, 18, 25).[12] The record establishes both that the jurors' responses were significantly hesitant and equivocal, and that

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12 Defendant also argues without support that the prosecutor may have treated other prospective jurors with similar problems differently. In fact, the only indications in the record are to the contrary. First, the prosecutor expressed the belief that not all of the jurors in question were Latino. Second, one of the reasons offered by the prosecutor for not challenging these jurors for cause was because they had ultimately stated that they could be fair and impartial—the same reason he had refused to consent to cause challenges to jurors whom defendant had claimed might be biased in favor of police testimony.

their demeanor left a substantial question about their ability to comply with the requirement that they accept as authoritative the English translation of the testimony.[13] Indeed, the trial court found that the prosecutor had "grave doubts" about the jurors' ability, based on their responses in *voir dire* (Joint App. at 10).

There is a difference between *assuming* that all persons who speak Spanish will be unable to abide by the court's instructions to accept as final the English translation of testimony given in Spanish, and *establishing* a basis in the record to suggest that individual Spanish-speakers might be unable to do so. The first may violate equal protection; the second, although it might have a disparate impact on Latinos, certainly does not. *See Slappy*, 503 So.2d at 355-56. *Batson* forbids only intentional discrimination, whether explicit or otherwise, based on impermissible bias, assumption or stereotype. *Batson* does not forbid the exclusion of jurors who have demonstrated through their answers and demeanor during *voir dire* that they might be unable to judge the case solely upon the admissible evidence.

The opinion of the Tenth Circuit Court of Appeals in *United States v. Brown*, 817 F.2d 674 (10th Cir. 1987), demonstrates the difference between improper assumptions and proper reliance on the facts revealed in *voir dire*. There, the prosecutor challenged African-American jurors on the

13 Contrary to defendant's claim (Brief for Petitioner at 14 n.9), the prosecutor properly relied on the jurors' demeanor during questioning in making his evaluation of their individual degree of uneasiness about their ability to perform the mental task required in this case. *See Patton v. Yount*, 467 U.S. 1025, 1038 n.14 (1984) ("Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying. Any complicated voir dire calls upon lay persons to think and express themselves in unfamiliar terms, as a reading of any transcript of such a proceeding will reveal. Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible."). Moreover, defendant never argued to the trial court that the prosecutor's understanding of the demeanor displayed by Latinos was mistaken. Therefore, he cannot now rely on this argument to undercut the trial court's decision.

assumption that they would be unduly influenced by the defendant's attorney, a prominent African-American attorney who, in the prosecutor's experience, had "a very special appeal" to African-Americans in the community. The Tenth Circuit ruled that the challenges exercised by the prosecutor were not race-neutral because they were based on "surmise" rather than fact. The court made clear, however, that had the *voir dire* disclosed "an affinity between a prospective juror and the defense counsel," it would have permitted the challenge. *Brown*, 817 F.2d at 676. Here, in significant contrast to the facts in *Brown*, the *voir dire* did substantiate the prosecutor's belief that the individual Spanish-speaking jurors he challenged might be unable to decide the case on the evidence heard by the remainder of the jury. Because the challenges in this case were based on evidence developed in *voir dire* and not on an assumption or racial stereotype, the challenges were race-neutral. *Cf. United States v. Wilson*, 884 F.2d 1121 (8th Cir. 1989); *Slappy*, 503 So.2d at 355.

C. Defendant's Impact-Based Definition of Racial Neutrality Unjustifiably Distorts the Intent of the Equal Protection Clause.

Defendant nonetheless argues that the prosecutor's reason was not race-neutral (or, in defendant's words, was "a *per se* violation of *Batson*" [Brief for Petitioner at 12]), *even if supported by the record*. None of the arguments defendant offers in support of this contention has any foundation in the evidence or in this Court's equal protection analysis.

Defendant first claims that the prosecutor's reason, if held to be valid, will inevitably result in the exclusion of all Spanish-speaking (and thus, all Latino) jurors from cases involving testimony in Spanish because "any honest bilingual juror" would demonstrate the same hesitancy (Brief for Petitioner at 14-17). This argument, which was never made to the trial court, is based on the type of group assumption that *Batson* was intended to preclude. Just as a racial assumption cannot support the peremptory challenge of a juror, so, too, a racial assumption—e.g., that all Latinos will be equally

hesitant—should not invalidate a peremptory challenge that is otherwise genuine and neutral. Jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race. . . . An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race." *Cassell v. Texas*, 339 U.S. 282, 286-87 (1950). Moreover, defendant has not demonstrated, and we do not believe, that such a result will occur.

Defendant has not provided persuasive support for his theory that the impact on Latinos of permitting legitimate challenges tangentially related to language fluency will so devastate the right of Latinos to sit as jurors that this Court should carve out an exception to its case law requiring proof of discriminatory intent in equal protection cases. It must be emphasized that the issue is not whether most Latinos are bilingual but whether qualified Latino potential jurors will all express the same equivocation as did the jurors in this case. While the statistics cited by defendant and the Mexican American Legal Defense and Educational Fund, *et al.* (hereinafter *amici*) show that the majority of Latino prospective jurors speak some Spanish, *see* Brief for Petitioner at 3 & n.3; Brief for *Amici*, Appendices, these statistics do not take into account the fact that no citizen is qualified to serve on a jury without sufficient English proficiency to understand the proceedings. As a result, those jurors who may have the greatest difficulty putting aside their Spanish language ability are the most likely to be excused for reasons unrelated to the prosecution's exercise of peremptory challenges. *See People v. Guzman*, 60 N.Y.2d 403, 411, 457 N.E.2d 1143, 1147, 469 N.Y.S.2d 916, 920 (1983), *cert. denied*, 466 U.S. 951 (1984) (finding that the under-representation of Latinos on grand jury panels in Brooklyn is due to nondiscriminatory reasons); *see also United States v. Wesevich*, 666 F.2d 984, 991 (5th Cir. 1982); *United States v. Yonkers Contracting Co.*, 682 F. Supp. 757, 762, 764-65 (S.D.N.Y. 1988).[14]

14 Like most states and the federal government, New York requires that all of its potential jurors be, *inter alia*, citizens of the United States who are able to read and write English well enough to fill out the juror qualification questionnaire and who can "speak the English language in an understandable manner." N.Y. Judiciary Law § 510; *see also* 28 U.S.C. § 1865.

In addition, the statistics cannot be broken down to eliminate from the bilingual category those jurors whose understanding of Spanish is either limited to the written word or so minimal that they will be unable to understand testimony given in Spanish without the assistance of an interpreter. There is no reason to believe that those jurors, at least, will equivocate about accepting that interpretation. Defendant's analysis, therefore, offers no support for the proposition, with which we vehemently disagree, that an affirmance in this case means that "*Batson* will essentially not apply to Latinos" (Brief for Petitioner at 8).[15]

Indeed, the statistics cited by defendant and *amici* (Brief for Petitioner at 10 & n.3; Brief for *Amici* at 8-11, Appendices) provide some support for the contrary view. According to those statistics, approximately one-fourth to one-third of the "Spanish-Origin population" who reside in the United States speak little or no Spanish.[16] Certainly, that large portion of the Latino population will have no difficulty in accepting testimony translated from Spanish. It is likely that different individuals will have more or less difficulty in accepting the official interpretation of the testimony depend-

15 *See City of Richmond, Va. v. J.A. Croson Co.*, 488 U.S. 469, 501-02 (1989) ("[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977); *see also Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

16 The term "bilingual" refers to anyone "who can function to some degree in more than one language." It can mean, for example, an individual "who is a native speaker of English and who can read French, but does not speak or understand the spoken French language." (Brief for *Amici*, Appendix F). That bilingual juror is unlikely to hesitate to accept the official translation of spoken words he or she cannot understand.

ing, for example, upon their relative degrees of fluency in English and Spanish.

Nor is there a basis to assume that all Spanish-speakers, even those who are the most fluent, will automatically be hesitant to assure the court that they will not listen to or consider information that the court has instructed them to overlook. Individual jurors will undoubtedly have individual responses to this inquiry. Jurors may have different views about the extent to which they will have a problem and the extent to which they can overcome it. The whole thrust of equal protection is to ensure that people are treated as individuals and are not discriminated against on the basis of group identity. Therefore, it is improper either to exercise *or* to disallow peremptory challenges based upon the assumption that all jurors who speak Spanish will both have and express the identical difficulty in accepting the official translation.

Furthermore, defendant would dramatically alter the *Batson* principles of neutrality in order to prevent whatever disparate impact might occur. "The moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *City of Richmond, Va. v. J.A. Croson Co.*, 488 U.S. 464, 578 (1989) (Kennedy, J., concurring). Yet, in defendant's view, apparently, an otherwise neutral reason for the exercise of a peremptory challenge, such as the juror's expression of difficulty in following the court's instructions, would lose its neutrality if the reason for the juror's expression of concern was related to Spanish language proficiency.[17]

17 Defendant asserts that "[t]he same type of 'hesitancy,' exhibited by these two jurors or other bilingual Latinos would exist if jurors generally were each questioned about their willingness and ability to follow other court instructions to disregard statements made in court. . . . Of course, jurors are not asked and it is assumed that they actually follow the court's instructions" (Brief for Petitioner at 16-17). In fact, inquiry from the parties and the court about prospective jurors' ability to decide the case based on the law and the facts takes place in criminal trials all the time. Presumably defendant would agree that equivocation in accepting the presumption of innocence would be a race-neutral reason for challenging a juror, and it is unlikely that he would support a rule requiring acceptance of that juror when the equivocation is somehow related to race or ethnicity.

Contrary to defendant's claim, "[w]hile [the *Batson*] rule interdicts the exercise of peremptory challenges for purely racial reasons, it does not forbid challenges of minority jurors for legitimate reasons tangentially connected with their race," *Brown*, 817 F.2d at 676, so long as the prosector "brings out facts during *voir dire*" which support those reasons. Serr and Maney, *supra*, at 51.

In *Gilmore*, 103 N.J. at 531, 511 A.2d at 1161-62, the New Jersey Supreme Court rejected an argument similar to defendant's as contrary to the principles of equal protection. The court distinguished "impermissible perceived group bias . . . from a prosecutor's exclusion of members of a cognizable group for valid, articulated, trial-related reasons," even if those reasons are related to race. In *St. Lawrence v. Scully*, 523 F. Supp. 1290, 1298 (S.D.N.Y. 1981), *aff'd*, 697 F.2d 296 (2d Cir. 1982), Judge Weinfeld rejected on *habeas corpus* review a state prisoner's challenge to a conviction in an interracial rape case that followed a trial at which the prosecutor challenged for cause an African-American juror who said that race "would have to be" a part of his consideration of the case, given "the history of events, based on the past." The juror's statement to the defense attorney that he could decide the case based on the evidence was insufficient to disallow the cause challenge. *Cf. Lynn v. Alabama*, 110 S. Ct. 351 (1989) (Marshall, J., dissenting from denial of *certiorari*) (reliance on a factor closely related to race should not be considered a legitimate basis for exercising a peremptory challenge unless there is some corroboration in *voir dire* that the challenged juror actually entertains the bias supposedly linked to that factor). These cases recognize the principle that a challenge does not lose its racial neutrality under *Batson* merely because something that the juror has articulated, leading to the challenge, is related to race; the issue, as it is in all

equal protection cases, is whether the prosecutor has acted on the basis of race.[18]

Examples suggested by defendant illustrate the fundamental flaws in his argument. In one example, (Brief for Petitioner at 21 n.17), based on a case involving identification of an African-American defendant by a white witness, defendant concludes that it would be improper to strike all African-American jurors on the assumption that they would doubt a white person's ability to identify accurately an African-American. We agree. However, if a juror's answers and demeanor during *voir dire* provided a basis for a party to believe that the juror might in fact be unable to judge fairly the identification testimony in the particular case to be tried, the challenge of that juror would not be prohibited by the Equal Protection Clause, irrespective of whether the juror's answers were related to race. Thus, it would not be impermissible to challenge an African-American who stated the belief that whites cannot make reliable cross-racial identifications. All that *Batson* prohibits is the assumption that members of a particular race would have such a belief and the striking of jurors on that assumption.

Similarly, in *Minniefield v. State*, 539 N.E.2d 464 (Ind. 1989) and *People v. Johnson*, 22 Cal.3d 296, 148 Cal. Rptr. 915, 583 P.2d 774 (1978), which provide the basis for defendant's other example (Brief for Petitioner at 20 n.16), the prosecutors' concern that African-American jurors might react negatively to prosecution witnesses who used racial epithets was rejected, not because it was a *per se* violation of *Batson* (or, in *Johnson*, of the California State Constitution), but because the prosecutors assumed without inquiry that by virtue of racial identity, all African-Americans would react the same way.

18 In his dissent in *Witherspoon v. Illinois*, 391 U.S. 510, 539-40 (1968), Justice Black cited the following quotation from Justice Story:

> To insist on a juror's sitting in a case when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice. We do not sit here to produce the verdicts of partial and prejudiced men; but of men, honest and indifferent in causes. This is the administration of justice [which is required]. *United States v. Cornell*, 25 Fed. Cas. 650, 655-656, No. 14,868 (1820).

By focusing solely on the perceived impact of the prosecutor's challenges in this case, rather than the prosecutor's intent, defendant seeks to turn *Batson* from the intent-driven inquiry mandated by the Equal Protection Clause into a result-driven inquiry barring peremptory challenges for reasons having a disparate impact on particular racial or national origin groups.

This Court has repeatedly affirmed, in many contexts, that proof of a disparate impact alone is not sufficient to establish a violation of the Equal Protection Clause. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (imposition of the death penalty); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (zoning); *Washington v. Davis*, 426 U.S. at 239-40 (employment discrimination); *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 298 (1973) (schools); *Wright v. Rockefeller*, 376 U.S. 52, 56-57 (1964) (election districting); *Whitus v. Georgia*, 385 U.S. 545, 550 (1967) (jury selection). This Court "ha[s] not embraced the proposition that a law or other official act, without regard to whether it reflected a racially discriminatory purpose, is unconstitutional *solely* because it has a disproportionate impact." *Davis*, 426 U.S. at 239 (emphasis in original); *see also Hunter v. Underwood*, 471 U.S. 222 (1985). In *Batson* itself, this Court stressed that the Equal Protection Clause prohibits those "[s]election procedures that purposefully exclude black persons from juries." 476 U.S. at 87. Therefore, to prevail on a *Batson* claim, as with any other claim founded on the Equal Protection Clause, the defendant must prove that the prosecutor used peremptory challenges with an intent to discriminate on the basis of race or other impermissible criteria. *Batson*, 476 U.S. at 93.

The fact that a challenged action has a disparate impact on members of the defendant's racial or national origin group may be used, as it was by the New York appellate courts in this case, to establish a *prima facie* case of discrimination in any equal protection context, requiring the state or the employer to set forth the neutral criteria which produced the unintended result. *Batson*, 476 U.S. at 93; *Davis*, 426 U.S. at 242. If such an explanation is not given, *see, e.g., Alexander v. Louisiana*, 405 U.S. 625, 632 (1972), the *prima facie* case remains unrebutted and the defendant has proven intentional discrimination. *Batson*, 476 U.S. at 100; *cf. Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). But disparate impact, standing alone, is insufficient to prove a violation of the Equal Protection Clause. In this case, the prosecutor met his burden of setting forth his legitimate, record-supported, neutral reason for challenging each of the prospective jurors. Therefore, the presumption of discrimination was rebutted.

The final flaw in defendant's argument is its implicit assumption that criminal defendants have a constitutional right to be tried by a jury which includes members of their own racial or national origin group, rather than by a jury selected through nondiscriminatory practices. The Equal Protection Clause "guarantees equal laws, not equal results." *Personnel Admin'r v. Feeney*, 442 U.S. 256, 273 (1979). In *Batson*, this Court once again stressed that defendants are not entitled under the Equal Protection Clause to any particular representation on the jury:

> In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in *Strauder* recognized, however, that a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.' *Id.*, at 305.

Batsbn, 476 U.S. at 85.

Moreover, in refusing to import the Sixth Amendment's fair cross-section requirement from the jury venire to the petit jury itself, this Court has recognized that the State may

have legitimate interests in permitting challenges that disrupt the original racial balance of the venire. For example, in *Lockhart*, 476 U.S. at 175-76, this Court held that because the state has a "legitimate interest in obtaining a single jury which can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial," the fair cross-section requirement is not violated when a group of prospective jurors is disqualified for a reason related to "the ability of members of the group to serve as jurors in a particular case." *See also Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (ruling that the Sixth Amendment does not require "that petit juries actually chosen must mirror the community and reflect the various distinct groups in the population."). Likewise, peremptory challenges based on reasons similar to those that support challenges for cause may, in a particular case, exclude members of the defendant's racial or national origin group, but that result also would not require or permit a court to disallow proper peremptory challenges. *See Alexander*, 405 U.S. at 631-32 (the State can rebut the inference of racial discrimination in selection of the venire by "showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.").

Contrary to defendant's claim (Brief for Petitioner at 26-27), the Equal Protection Clause does not require the state to consider alternatives to neutral practices which have a disparate impact on a racial or national origin group. Only after a finding of intentional discrimination—a finding which has not been made in this case—does the Equal Protection Clause require the state to establish that the challenged action serves a compelling state interest. *See J.A. Croson Co.*, 488 U.S. at 469. Furthermore, the alternative remedy suggested by defendant, that a juror notify the court whenever the juror disagrees with the official interpretation (Brief for Petitioner at 26), is inadequate; it does nothing to prevent the juror from relying on or offering to his or her fellow jurors a different version of the evidence during deliberations.

Although assuring the accuracy of the official translation of testimony is absolutely essential to a fair judicial system, the facts of *United States v. Perez*, 658 F.2d 654 (9th Cir. 1981), compellingly demonstrate that the best way to address the problem is for courts to train and officially oversee the official interpreters, rather than to permit every juror to become an *ad hoc* interpreter with the duty to critique the translation in a particular case. And, contrary to the reasoning of the dissent below, it is not logical to assume that if the official interpreters are accurate, jurors will have no disagreements with their interpretation. *Hernandez*, 75 N.Y.2d at 364, 552 N.E.2d at 628, 553 N.Y.S.2d at 92. This assumption disregards the fact that not every Spanish-speaker can understand every other Spanish-speaker. Like English, French, or any other language spoken by large and geographically disparate groups, there are many regional dialects of Spanish. Also, as *amici* point out, different jurors are likely to have different levels of proficiency and comprehension. Given the grave consequences of mistaken interpretation, the responsibility for ensuring accurate interpretation should be left to the official court interpreters who, unlike jurors, are certified by the court in New York State, are required to take a constitutional oath of office, N.Y. Judiciary Law § 386, and are under a legal duty to translate the testimony accurately and to inform the court if they cannot understand the witness.

The New York courts properly applied *Batson* to the prosecutor's peremptory challenges in this case. The fact that the prosecutor's challenges resulted in the exclusion of Latinos from the jury led the trial court to examine the prosecutor's reasons; it did not require the court to reject those reasons as a matter of fact or as a matter of law. The New York appellate courts critically examined the *voir dire* record and concluded that the prosecutor's reasons were neither based on racial assumptions nor pretextual, but were instead clearly articulated, based on the responses of the jurors developed during *voir dire*, and related to the case on trial. These rulings should be affirmed.

POINT II

THE FACTUAL FINDINGS UNDERLYING A TRIAL COURT'S DETERMINATION THAT THE PROSECUTION HAS PROFFERED LEGITIMATE, NEUTRAL REASONS FOR ITS PEREMPTORY CHALLENGES ARE ENTITLED TO GREAT DEFERENCE ON APPEAL AND SHOULD NOT BE OVERTURNED UNLESS CLEARLY ERRONEOUS.

Appellate courts evaluating *Batson* claims are guided by the principles which this Court has consistently applied to other equal protection cases, especially those involving the selection of juries. "The basic principles prohibiting exclusion of persons from participation in jury service on account of their race 'are essentially the same for grand juries and for petit juries.' " *Batson*, 476 U.S. at 84 n.3 (citing *Alexander v. Louisiana*, 405 U.S. 625, 626 n.3 [1972]). The *Batson* Court expressly incorporated into its procedures for reviewing peremptory challenges the "standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause," 476 U.S. at 93, as well as traditional equal protection analysis regarding the burden of proof and the standard of review. 476 U.S. at 93-94, 94 n.18, 98 n.21. That is, the appellate court must first determine whether the prosecutor's explanation for each peremptory challenge at issue is, as a matter of law, neutral on its face. If so, the court must then review the record to determine whether the explanation meets all of the other *Batson* criteria, but must give deference to the trial court's factual findings and can reverse them only if clearly erroneous. The New York Court of Appeals conscientiously followed this framework in analyzing defendant's claim of discrimination in the selection of the jury in this case. *Hernandez*, 75 N.Y.2d at 355-57, 552 N.E.2d at 623-24, 553 N.Y.S.2d at 87-88.

Nonetheless, defendant urges that his case must now be given "independent plenary review" (Brief for Petitioner at 28). Defendant is neither clear nor consistent about what he considers "plenary review" to entail. If it requires an appel-

late court to carefully review the entire record to determine whether the trial court's factual findings are supported by the evidence and based on an application of the correct legal principles, then defendant received "plenary review" of his claims by the New York Court of Appeals. If, instead, plenary review requires appellate courts to review *Batson* claims *de novo*, giving no deference to the trial court's factual findings, then defendant has proposed a new standard of review which differs from the standard of appellate review set out in *Batson* and in other equal protection contexts, as well. There is no support in law or policy for applying a special standard of review in peremptory challenge cases. "There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." *Craig v. Boren*, 429 U.S. 190, 211-212 (1976) (Stevens, J., concurring).

In setting out the principles of law to be applied to a claim of discrimination in the selection of the petit jury, this Court in *Batson* expressly incorporated the standard of appellate review traditionally applied in equal protection cases.

This Court stressed that "[a]s in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection . . . to prove the existence of purposeful discrimination.' " *Batson* 476 U.S. at 93 (citing *Whitus v. Georgia*, 385 U.S. 545, 550 [1967]). Furthermore, in embracing the rules established for disparate treatment claims under Title VII for the allocation of the intermediate burdens of proof and production, the Court reiterated that the "party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion." *Batson*, 476 U.S. at 94 n.18. And finally, the Court made clear that the trial court's findings of fact, including its finding on the issue of the prosecutor's intent, would be entitled to great deference on appeal:

> '[A] finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Id.*, at 575-76.

Batson, 476 U.S. at 98 n.21.

This Court's admonition to appellate courts to give great deference to the trial court's factual findings and its citation to *Anderson* represent an adoption of the clear error standard which is traditionally applied to appellate review of determinations regarding intentional discrimination in other contexts. In *Anderson*, 470 U.S. at 573, a disparate treatment, gender-discrimination case brought under Title VII, this Court discussed the scope of the deference to be given findings on the issue of intentional discrimination in the federal courts, as set forth in Federal Rule of Civil Procedure 52(a). A "finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Under this standard, the reviewing court is not permitted to decide the factual issues *de novo* and to reverse the factual findings of the lower court simply because it would have decided the case differently. *Anderson*, 470 U.S. at 573. The appellate court must respect the trial court's superior ability to judge credibility, stemming from the trial court's unique opportunity to see and hear the witnesses. Therefore,

> [i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that, had it been sitting as the trier of fact it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

Anderson, 470 U.S. at 573-74 (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 [1949]); *see* also *Clemons v. Mississippi*, 110 S. Ct. 1441, 1457-58 (1990) (Blackmun, J., concurring in part and dissenting in part).[19]

The question of intentional discrimination has long been treated as a factual determination for the trial court, to be given deference on appeal. In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), this Court ruled that a finding on whether a company's seniority system reflected an intent to discriminate on the basis of race

> is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent. Discriminatory intent here means actual motive; it is not a legal

19 This standard of review has been adopted by every federal Circuit Court of Appeals which has reached the issue of the standard of review to be applied to *Batson* determinations. *See United States v. Grandison*, 885 F.2d 143, 146 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 2178 (1990); *United States v. Angiulo*, 847 F.2d 956, 985 (1st Cir.), *cert. denied*, 488 U.S. 852 (1988); *United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *United States v. Clemons*, 843 F.2d 741, 744 (3rd Cir.), *cert. denied*, 488 U.S. 835 (1988); *United States v. David*, 844 F.2d 767, 769 (11th Cir. 1988); *United States v. Lewis*, 837 F.2d 415, 417 (9th Cir.), *cert. denied*, 488 U.S. 923 (1988); *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987); *United States v. Love*, 815 F.2d 53, 54-55 (8th Cir.), *cert. denied*, 484 U.S. 861 (1987); *Mathews*, 803 F.2d at 325. Similar deference is accorded to the trial court's factual findings of *Batson* claims by most state appellate courts. *See, e.g., Ex Parte Branch*, 526 So.2d 609, 625 (Ala. 1987); *People v. Johnson*, 47 Cal.3d 1194, 1221, 255 Cal. Rptr. 569, 579-80, 767 P.2d 1047, 1059 (1989); *Gamble*, 257 Ga. 325, 357 S.E.2d at 794; *Butler*, 731 S.W.2d at 271 (all applying great deference/clear error standard); *People v. McDonald*, 125 Ill.2d 182, 125 Ill. Dec. 781, 530 N.E.2d 1351, 1358 (1988) (against the manifest weight of the evidence); *Stamps v. State*, 515 N.E.2d 507, 510 (Ind. 1987) (manifest abuse of discretion); *Keeton v. State*, 749 S.W.2d 861, 870 (Tex. Crim. App. 1988) (viewing evidence "in the light most favorable to the [trial] court," is the decision supported by the record).

> presumption to be drawn from a factual showing of anything less than actual motive.

at 289-90; *see also White v. Register*, 412 U.S. 755 (1973) (great deference accorded findings of intentional racial discrimination in vote dilution cases). In short, review of factual findings under the clear error standard is "the rule not the exception." *Anderson*, 470 U.S. at 575.

Clear error is also the appropriate standard for reviewing all of the subsidiary factual issues which lead to the trial court's ultimate determination regarding intentional discrimination in a *Batson* case. As codified in Rule 52(a), the clear error standard "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard*, 456 U.S. at 287; *cf. Miller v. Fenton*, 474 U.S. 104, 117 (1985) (review of subsidiary factual questions in determining the voluntariness of a confession is to be given deference on *habeas corpus* review, even though voluntariness is a mixed question of law and fact).

Moreover, although Rule 52(a) does not apply to review of state cases, "it would pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of intermediate federal courts." *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984). This Court should apply the same standard of review to state and federal determinations of *Batson* claims. Furthermore, this Court should not impose on state appellate courts a more stringent standard of review than the federal appellate courts apply to claims of intentional discrimination.

Contrary to defendant's argument that a different standard is required, this Court has found the clear error standard to be well suited to appellate review of issues similar to the one

here. In considering the related issue of a juror's bias or unfitness to serve, this Court explained:

> [T]he determination is essentially one of credibility and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal to 'special deference.'

Patton, 467 U.S. at 1038 (citation omitted). "The question of a juror's bias or prejudice is totally factual in nature." *Peters v. Kiff*, 407 U.S. 493, 511 (1972) (Burger, C.J., dissenting). Trial judges at *voir dire*, like jurors at trial, "must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions. . . . In neither instance can an appellate court easily second-guess the conclusion of the decision-maker who heard and observed the witnesses." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); *see also Wainwright v. Witt*, 469 U.S. at 429.

Credibility and demeanor are no less at issue in peremptory challenge cases. The Second Circuit has explicitly rejected defendant's suggestion (Brief for Petitioner at 45) that it is an appellate court's task in a peremptory challenge case to "decide which side is more likely correct." *United States v. Ruiz*, 894 F.2d 501, 506 (2d Cir. 1990). Instead, the trial court's "findings as to the motivations of the prosecution in exercising its peremptory challenges must be upheld unless they are clearly erroneous . . . and its assessment of the credibility of the witnesses who appear before it are entitled to considerable deference." *United States v. Biaggi*, 853 F.2d 89, 96 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

The New York Court of Appeals in this case scrupulously honored its obligation under *Batson*. The court rejected defendant's claim, first articulated before that court, that the prosecutor's explanation was invalid *per se* because of its disparate effect on Latinos, and ruled that:

> [I]t cannot be, as defendant has posed it and as the dissenting opinion would conclude, that the isolated language-ethnic factor alone determines this case. Rather, the prosecutor's belief was that the two Spanish-speaking jurors might be unable or unwilling to accept the evidence properly submitted to them by the court. That is a legitimate neutral ground for exercising a peremptory challenge, and it was for the trial court to determine if the prosecutor's explanation was pretextual or real and justified by the answers and conduct of the two jurors during voir dire.

75 N.Y.2d at 356, 552 N.E.2d at 623, 553 N.Y.S.2d at 87. The Court of Appeals then reviewed the entire record and found sufficient support for the lower courts' factual findings that the jurors had displayed the hesitancy upon which the prosecutor had based his challenges; that the prosecutor's reason was genuine, case-related and not pretextual; and that defendant had failed to meet his burden of proving purposeful discrimination in this case. While the Court of Appeals properly gave deference to the factual findings of the lower courts, the court made it clear that it would not accept as sufficient "less verifiable manifestations of juror's attitudes." 75 N.Y.2d at 358, 552 N.E.2d at 624, 553 N.Y.S.2d at 88. The court properly affirmed the conclusion that a violation of the Equal Protection Clause had not occurred in this case.[20]

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20 The New York Court of Appeals has jurisdiction only over questions of law in most criminal cases; it can review facts only in death penalty cases. N.Y. Const. art. VI, § 3; N.Y. Crim. Proc. Law §§ 450.70, 450.80, 470.30, 470.35. By contrast, the Appellate Division has unusually broad factual review powers in criminal cases and is expressly permitted to engage in *de novo* factual review. N.Y. Crim. Proc. Law § 470.15. Under this jurisdictional scheme, the Court of Appeals cannot reverse any factual finding made by a criminal trial court and affirmed by an Appellate Division unless that factual finding is unsupported by the evidence as a matter of law. *People v. Leonti*, 18 N.Y.2d 384, 390, 222 N.E.2d 591, 594, 275 N.Y.S.2d 825, 850 (1966), *cert. denied*, 389 U.S. 1007 (1967). Thus, the Court of Appeals could not conduct the *de novo* factual review defendant asks this Court to adopt.

Defendant fails to justify the application of a different standard to jury selection cases. First, he mistakenly asserts that this Court employed a contrary standard of review in its decisions prior to 1977. Although there is some language in the cases upon which defendant relies suggesting that the determination was to be made *de novo*,[21] most of the cases articulate a review standard more similar to the clear error standard applied today than to the plenary review standard defendant urges this Court to adopt. *See Avery v. Georgia*, 345 U.S. 559, 561 (1953); *Cassell v. Texas*, 339 U.S. 282, 283 (1950); *Fay v. New York*, 332 U.S. 261, 270 (1947); *Smith v. Texas*, 311 U.S. 128, 130 (1940); and *Norris v. Alabama*, 294 U.S. 587, 589-90 (1935). Indeed, in another case decided during this period, *Akins v. Texas*, 325 U.S. 398 (1945), the Court expressly applied a clear error standard of review. The *Akins* Court affirmed the factual findings of the trial court, ruling that the trial court's determination regarding the competing inferences in the testimony and its ultimate finding that there had been no intentional discrimination were not unreasonable in light of the record as a whole.

More importantly, regardless of the language used to articulate the review standard in these cases, the Court examined the record in a manner entirely consistent with the clear error standard of review which it now applies to such cases. Thus, in *Castenada v. Partida*, 430 U.S. 482 (1977), *Whitus v. Georgia*, 385 U.S. 545 (1967), *Avery*, *Cassell*, *Smith*, *Pierre*, and *Norris*, this Court essentially ruled that the factual findings of the trial courts were clearly erroneous because the state in each case had failed to offer any explanation sufficient to rebut the *prima facie* case of discrimination: either the state offered no explanation at all or it had proffered an

21 *See Pierre v. Louisiana*, 306 U.S. 354, 358 (1939) ("when a claim is properly asserted . . . that a citizen whose life is at stake has been denied the equal protection of his country's laws because of race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts").

explanation which amounted to no more than general protestations of good faith.[22]

There is no merit to defendant's other suggestion that "independent plenary review" is necessary because trial judges cannot meet their responsibilities under *Batson* (Brief for Petitioner at 39-41). This Court in *Batson* twice expressed "confidence that trial judges, experienced in supervising *voir dire*" will be able to identify purposeful discrimination in jury selection. 476 U.S. at 96, 99 n.22. In other contexts, the Court has "reiterate[d its] confidence that state judges, no less than their federal counterparts, will properly discharge their duty to protect the constitutional rights of criminal defendants." *Miller v. Fenton*, 474 U.S. at 117. "[C]ourts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

Not only are trial courts required, in a variety of contexts, to identify "discriminatory conduct and pretextual explanations" *McCray*, 750 F.2d at 1132, but they are often called upon to judge the credibility of prosecutors in response to suppression motions, trial objections, allegations of prosecutorial misconduct and other issues implicating a defendant's constitutional rights. They are certainly no less able than appellate judges to decide the issues in a *Batson* case. *See People v. Johnson*, 47 Cal.3d at 1219 n.6, 255 Cal. Rptr. at 578 n.6, 767 P.2d at 1056 n.6 ("[T]rial judges know the local prosecutors assigned to their courts and are in a better position than appellate courts to evaluate the credibility and the

22 In *Cassell*, for example, the undisputed facts have "no other rational meaning than purposeful discrimination." 339 U.S. at 295-96 (Frankfurter, J., concurring); *see also Norris*, 294 U.S. at 593 ("We are of the opinion that the evidence required a different result from that reached in the State courts."); *Smith*, 311 U.S. at 131 ("From the record before us the conclusion is inescapable" that unlawful discrimination occurred.).

genuineness of reasons given for peremptory challenges."); *see also Soares*, 377 Mass. at 490, 387 N.E.2d at 517 ("Although decisions of this nature are always difficult, we are convinced that trial judges, given their extensive experience with jury empanelment, their knowledge of local conditions, and their familiarity with attorneys on both sides, will address those questions with the requisite sensitivity."); *Gilmore*, 103 N.J. at 545, 511 A.2d at 1169.

Contrary to the opinion of the dissent below, *Hernandez*, 75 N.Y.2d at 360-61, 552 N.E.2d at 626-67, 553 N.Y.S.2d at 90-91, appellate courts are not left helpless by the application of the traditional equal protection standard of review to peremptory challenge cases. The deference to trial courts' factual findings inherent in the clear error standard certainly does not forbid a comprehensive and searching review of the factual record. *Bose Corp.*, 466 U.S. at 499-500. Application of this standard of appellate review to the factual findings inherent in *Batson* claims does not suggest that appellate courts should engage in anything less than a rigorous, careful, and complete review of the record to determine whether the trial court's factual findings are supported by the *voir dire* questioning itself and all of the arguments made by each side. *See Patton*, 476 U.S. at 1031 n.7.

Indeed, the deferential review currently applied by federal and state appellate courts has not resulted in the wholesale adoption of trial courts' factual determinations in *Batson* cases. Rather, appellate courts are carefully examining the evidence available to them to determine whether the trial courts' conclusions are supported by the record. *See, e.g., United States v. Chinchilla*, 874 F.2d 695 (9th Cir. 1989); *Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987), *cert. denied*, 489 U.S. 1052 (1989); *United States v. Clemmons*, 892 F.2d 1153 (3rd Cir. 1989), *cert. denied*, 110 S. Ct. 1623 (1990); *Wilcox v. Ford*, 813 F.2d 1140 (11th Cir.), *cert. denied*, 484 U.S 925 (1987).[23] A similar searching inquiry was undertaken

23 Even the most skeptical legal critics cite cases where trial and appellate courts are applying exacting review of *Batson* claims. *See, e.g.*, Note, *Rebutting the Inference of Puposeful Discrimination in Jury Selection under Batson v. Kentucky*, 57 UMKC L. Rev. 355, 366 n.110 (1989); Note, *Batson v. Kentucky: Two Years Later*, 24 Tulsa L.J. 63, 86-87 (1988); *Blume, Racial Discrimination in the State's Use of Peremptory Challenges: The Application of the United States Supreme Court's Decision in Batson v. Kentucky in South Carolina*, 40 S.C.L. Rev. 299, 331-33 (1989). Nor does the case law support the argument that because prosecutors no longer attempt to justify peremptory challenges by overtly racist reasoning, *Batson* has simply forced prosecutors to be more subtle in their racism. The cases clearly support the contrary inference: that the majority of prosecutors are honestly attempting to follow *Batson*.

in this case, within the boundaries permitted by the record defendant provided to support his claim.

Although defendant now seeks to have this case remanded to the trial court to make more explicit findings of fact than were originally made, he is not entitled to that relief. It is not the court's duty to ensure that an adequate record is made to permit appellate review of a defendant's claim. That duty is solely the responsibility of the defendant. *See People v. Olivo*, 52 N.Y.2d 309, 420 N.E.2d 40, 438 N.Y.S.2d 242 (1981); *People v. Yarborough*, 158 A.D.2d 811, 812, 551 N.Y.S.2d 397, 399 (3d Dep't), *leave denied*, 75 N.Y.2d 971, 555 N.E.2d 628, 556 N.Y.S.2d 256 (1990); N.Y. Crim. Proc. Law § 470.05(2). Here, the defendant neither requested that the *voir dire* be recorded in its entirety nor attempted to place his own characterizations of the challenged jurors' responses or demeanor on the record to support the arguments he now seeks to make on appeal. He did not claim that the prosecutor had questioned only Latinos about their language proficiency and its impact on their ability to decide fairly this case. He also did not claim that the prosecutor challenged only Latino prospective jurors who were unsure about their ability to decide the case solely upon the admissible evidence and the law. Thus, if the factual record in this case is not as complete as it might have been, any shortcoming is of the defendant's making. *See Wainwright v. Witt*, 469 U.S. at 437-38 (Stevens, J., concurring); Serr and Maney, *supra*, at 38. Defendant is certainly not entitled to a remand to the

trial court to permit him to flesh out the factual basis for arguments conceived during the appellate process.

Finally, this Court should reject defendant's claim that without a *de novo* appellate determination of the facts, the rights provided in *Batson* are vain and illusory. By removing the barrier to effective review of peremptory challenges, the *Batson* decision has profoundly changed the jury selection process. The experience since *Batson* demonstrates that the *Batson* rule has given trial and appellate courts the means to combat the improper use of peremptory challenges to disqualify jurors on the basis of race. For example, in the twenty years between *Swain* and *Batson*, only two defendants were able to meet the initial burden of establishing a *prima facie* case of intentional racial discrimination in the selection of the petit jury, and thus to have a court review the prosecutor's reason for exercising peremptory challenges against members of the defendant's racial group. *See McCray*, 750 F.2d at 1120. In the four and one-half years since *Batson*, trial and appellate courts across the country in hundreds of cases have found that the defense met its initial burden of proof and reviewed the prosecution's reasons for exercising challenges.

Batson has done more than simply reduce the defendant's initial burden of proof. Prior to *Batson*, many prosecutors misread *Swain* as authorizing racial assumptions as legitimate bases for peremptory challenges. That misconception no longer exists: *Batson* has made prosecutors across the country sensitive to racial issues which they previously were not required to consider in an individual case. By requiring prosecutors to articulate genuine and truly neutral reasons for their challenges, *Batson* necessarily has reduced both conscious and unconscious racial discrimination in jury selection.

Moreover, the case law reflects that most trial and appellate courts are not accepting at face value the reasons offered by prosecutors for their challenges. At both levels, courts are carefully reviewing the prosecutors' reasons and are rejecting those that are not race-neutral, that are not justified by the

facts of the case and the information obtained about the jurors during *voir dire*, or that are not evenly applied to all jurors, regardless of race. *See, e.g., Chinchilla*, 874 F.2d at 698-99; *Brown*, 817 F.2d at 676; *Garrett v. Morris*, 815 F.2d 509, 514 (8th Cir.), *cert. denied*, 484 U.S. 898 (1987); *Roman*, 822 F.2d at 228; *Jackson v. State*, 557 So.2d 855 (Ala. Crim. App. 1990); *Gamble*, 257 Ga. 325, 357 S.E.2d 792; *State v. Belnavis*, 246 Kan. 309, 787 P.2d 1172 (1990); *Butler*, 731 S.W.2d 265; *People v. Bozella*, 556 N.Y.S.2d 121 (2d Dep't 1990); *People v. Mack*, 143 A.D.2d 280, 532 N.Y.S.2d 161 (2d Dep't 1988); *Miller-El v. State*, 790 S.W.2d 351 (Tex. App. Dallas 1990).

Many state and federal courts have taken a more expansive view of *Batson* and applied it beyond the original racial context to bar gender discrimination, *United States v. De Gross*, 913 F.2d 1417 (9th Cir. 1990); *People v. Blunt*, 162 A.D.2d 86, 561 N.Y.S.2d 90 (2d Dep't 1990); *People v. Irizarry*, 560 N.Y.S.2d 279 (1st Dep't 1990), and to bar discrimination against identifiable segments of the white population, such as Italian-Americans. *Biaggi*, 853 F.2d 89. Courts have also expanded the requirement of personal standing announced in *Batson* and have applied the *Batson* rule to cases where the defendant was not of the same race or gender as the excluded jurors.[24] *De Gross*, 913 F.2d at 1425; *Blunt*, 162 A.D.2d at 89, 561 N.Y.S.2d at 92; *Irizarry*, 560 N.Y.S.2d at 280. The rationale underlying *Batson* has been applied to bar criminal defendants from using their peremptory challenges on the basis of race, *De Gross*, 913 F.2d at 1423-24; *People v. Kern*, 75 N.Y.2d 638, 643, 554 N.E.2d 1235, 1236, 555 N.Y.S.2d 647, 648, *cert. denied*, 111 S. Ct. 77 (1990),[25] and has been

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24 The issue of cross-racial standing is before this Court in *Powers v. Ohio*, *cert. granted*, 110 S. Ct. 1109 (1990), which was argued on October 9, 1990.

25 In *Kern*, several white men were charged with the racially motivated killing of one African-American man and the assault upon another in Howard Beach, New York. After the prosecutor objected, the trial court required the defense attorneys to give race-neutral reasons for their peremptory challenges of the African-American jurors. That ruling was upheld on appeal.

held to bar parties in a civil case from exercising peremptory challenges on that basis. *Fludd v. Dykes*, 863 F.2d 822, 828 (11th Cir.), *cert. denied*, 110 S. Ct. 149 (1989); *Edmonson v. Leesville Concrete Co.*, 860 F.2d 1309, 1313-14 (5th Cir. 1988).

Thus, the *Batson* rule is being diligently and expansively applied by courts across the country. Application of the long-recognized deferential standard of review to the trial courts' factual findings has had no chilling effect on the meaningful review of *Batson* claims or on the development by appellate courts of the criteria trial courts are to employ to implement the rule. Contrary to defendant's view, an affirmance will not deprive Latinos of the full power and protection to which they are entitled under *Batson*. A number of courts have already acted to prevent discrimination against Latinos in jury selection, *see, e.g., State v. Gonzalez*, 206 Conn. 391, 538 A.2d 210 (1988); *Bueno-Hernandez v. State*, 724 P.2d 1132 (Wyo. 1986), and Latino potential jurors must still be judged by their individual ability to serve, rather than according to impermissible stereotype or bias.

In sum, when reviewing a trial court's *Batson* determination, the state or federal appellate court must first satisfy itself that the prosecutor's reason for each peremptory challenge is, as a matter of law, neutral on its face. Then, if the reason is neutral, the court must review the record, according the trial court's factual findings the same degree of deference ordinarily applied to other findings of fact. As this Court has clearly articulated, the standard for federal courts of appeal, and therefore for this Court's review of *Batson* claims arising in state courts, is "great deference."

Applying these standards, defendant's conviction must be affirmed. As the New York Court of Appeals correctly ruled, a juror's inability to affirm without hesitancy or equivocation that he or she can decide the case based solely upon the admissible evidence is a neutral reason for challenging that juror. Moreover, the record fully supports each lower courts' determination that the challenged jurors were equivocal and

hesitant, that their responses were sufficient to create "grave doubts" about whether they could abide by the translation, and that acceptance of the English interpretation of testimony given in Spanish was, at the time of jury selection, expected to be critical to a fair determination of the facts of this case. Thus, the trial court's determination that defendant failed to prove intentional discrimination is not clearly erroneous and should be affirmed.

CONCLUSION

The affirmance of defendant's conviction by the New York Court of Appeals did not in any way depart from or eviscerate the constitutional guarantee of equal protection of the law reaffirmed in this Court's *Batson* decision. The state appellate court did not sanction peremptory challenges based on race or ethnicity. Nor did that court authorize the exercise of peremptory challenges based on an assumption that in a case involving testimony in Spanish all Spanish-speaking jurors are unable to discharge their duties faithfully and impartially—an abhorrent notion that is contrary to common sense and the teaching of *Batson* that jurors should be selected on the basis of their individual qualifications rather than upon untenable group stereotypes. Rather, the state court merely held, after according due deference to the lower courts' findings of fact, that the prosecutor struck two jurors who had equivocated when asked questions directly probative of whether they would respect their duty to decide the case solely on the admissible evidence, and that this was a permissible reason for the exercise of a peremptory challenge. Because the Court of Appeals applied the appropriate standard of appellate review, and correctly determined that the prosecutor exercised his challenges for a race-neutral, case-related reason, its decision complied with the dictates of the Equal Protection Clause and this Court's decision in *Batson*.

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

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